Regulatory Dilemma
Sediment Management Standards, Sediment Cleanup Requirements, Clean Water Act and Fish Consumption Rates

Background

- The Water Pollution Control Act, the Model Toxics Control Act and several other state laws are cited as the legal authorities for the SMS rule.
- The SMS rule includes a decision-making process for sediment cleanup actions (Part V – Sediment Cleanup Standards).
- The SMS rule includes a narrative cleanup standard based on human health protection ("no significant health risk to humans").
- Significant parts of the SMS rule (including the cleanup screening levels and the sediment cleanup standards) are part of the federally-approved water quality standards.

Recent Rulemaking Efforts

- Ecology began efforts to revise the SMS rule and the MTCA Cleanup Regulation in early 2009.
- The SMS rule revision process is addressing several issues that include, but are not limited to:
  - Synchronize the policies and procedures in Part V of the SMS rule (sediment cleanup standards) with the MTCA rule policies and procedures.
  - Establish a decision-making framework for sediment cleanup based on human health protection. These includes (1) specifying a target risk level for sediment cleanup (e.g., 10-6 cancer risk and HQ = 1) and (2) defining how background concentrations are taken into account when selecting sediment cleanup standards and cleanup actions.
  - Freshwater sediment criteria (This issue is separate from the human health and fish consumption issues that are the focus of the current internal discussions).
- The MTCA rule revisions included a wide range of issues. One key issue was the fish consumption rate used to establish MTCA surface water cleanup standards.
  - The MTCA rule specifies that surface water cleanup levels must be at least as stringent as:
    - Water quality standards established in Chapter 173-201A WAC
    - Risk-based concentrations calculated using a cancer risk level of 10-6/HQ=1, EPA toxicity values and a default FCR of 54 g/day (based on recreational scenario)
  - Ecology planned to revise the default fish consumption rate to reflect current scientific information on tribal consumption rates and site-specific implementation experience.

Current Status of Ecology Rulemaking

- The Governor issued a rule moratorium in November 2010. Agencies were required to evaluate their rules using criteria established by the Governor.
- Ecology decided to:
  - Continue to work on revisions to Part V (Sediment Cleanup Standards) and supporting provisions (e.g., definitions). Ecology will also be considering criteria for freshwater sediments.
  - Stop work on the MTCA rule revisions.
  - Try to address the fish consumption issue as part of the SMS rule revision process.
- Concurrent with the SMS rule revisions, Ecology also plans to continue to address fish consumption issues as part of the triennial review of Chapter 173-201A WAC.

Issues/Questions Moving Forward

Description of Planned/Potential Revision	Questions/Assumptions
• Amend Sections 560 (Cleanup Study) and 580 (Cleanup Action Decision) to synchronize terminology and requirements with MTCA rule. • Amend Section 580 to ensure that requirements for sediment cleanup actions comply with the state cleanup law (e.g., permanent to maximum extent practicable).	• Section 560 and 580 are not identified in the EPA docket as being applicable under the Clean Water Act (June 30, 1999 Letter from Randy Smith to Megan White and Jim Pendowski). • Is it correct to assume that revisions to these two sections would not represent revisions to the federally-approved water quality standards?

• Track #1: Amend Section 570 to establish:
  • Human health risk policies that would be used when implementing the current narrative standards for human health risks.
  • Decision-making framework that defines how background concentrations are considered when setting sediment cleanup standards.
  • Default fish consumption rate that would be used when establishing risk-based sediment cleanup standards and criteria for site-specific modifications of the default.
	• Section 570 is identified in the EPA docket as being applicable under the Clean Water Act (June 30, 1999 Letter from Randy Smith to Megan White and Jim Pendowski).
	  • Is it correct to assume that revisions to this section would represent revisions to the federally-approved water quality standards?
	• Section 570 outlines how Ecology will implement the sediment quality standards (SQS) when establishing sediment cleanup standards. The current rule provides the flexibility to establish sediment cleanup standards at concentrations above the SQS level. The sediment cleanup standards are then used to define areas requiring active cleanup. Areas with concentrations between the SQS and the cleanup standards are handled through a sediment recovery zone/source control/natural recovery.
	  • Is it correct to assume that the same approach could be used for sediment cleanup standards based on human health protection?
	  • Is it correct to assume that the state has the flexibility to consider site-specific modifications to default FCRs when establishing sediment cleanup standards (as opposed to modifying the underlying SQS)?

• Track #2: Create a new state-only provision (Section 571) to establish:
  • Human health risk policies for sediment cleanup standards;
  • Decision-making framework defining role of background when setting cleanup standards;
  • Default fish consumption rate and criteria for site-specific modifications.
	• Establish a new state-only provision (Section 571) for cleanup standards under the state cleanup law that specifies that sediment cleanup standards at MTCA sites must meet (1) the federally approved sediment cleanup standards in Section 570 and (2) the additional state-only requirements in Section 571.
	  • Is it correct to assume that federal law allows Ecology to establish state-only requirements for sediment cleanup standards that are at least as stringent as the federally-approved sediment cleanup standards in WAC 173-204-570?
	  • If yes, are there constraints under federal law that Ecology should take into account if we elected to pursue this approach?